WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.09.2007

CORAM:

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN
and
THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

T.C. (Appeal) No.50 of 2004

The Commissioner of Income-tax
Coimbatore. .. Appellant

versus

M/s.Madras Oxygen and Acetylene Co. Ltd.
Thekkupalayam Post, P.N.Palayam
Coimbatore. .. Respondent

PRAYER: Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961, against the order dated 15.7.2003 passed in I.T.A.No.564/MDS/1995 on the file of the Income-tax Appellate Tribunal "B" Bench, Chennai against the order of Commissioner of Income Tax (Appeals) Coimbatore, dated 10.1.95 in I.T.A.257-C/94-95 and arising out of the assessment order of Deputy Commissioner of Income Tax Special Range I, Coimbatore dated 30.3.94 in PAN/GIR.No-CX-2293.

For appellant : Mr.T.Ravikumar
Standing Counsel for Income Tax

For respondent : Mr.Venkatanarayanan
representing M/s.Subbaraja Aiyar

JUDGMENT

CHITRA VENKATARAMAN,J.

The following is the question of law raised by the Revenue in the Tax Case Appeal filed against the order of the Tribunal relating to the Assessment Year 1991-92:

" Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in holding that the investment allowance carried forward can be set off against income from other sources to the extent to which it reduces the total income to nil

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

under Section 32A(3) of the Income-tax Act, even though the assessee has no business income for the assessment year under consideration. "

2. The assessee is a company manufacturing oxygen and acetylene gas. The assessee derived income from the sale of cylinders used for the purpose of filling these gases. The cost on the purchase of the cylinders was allowed as a revenue deduction. The Assessing Authority, however, treated the entire income from the sale of the cylinders as short-term capital gains by invoking Section 50 of the Income Tax Act, 1961. In the revised return filed by the assessee on 10.2.1993, it claimed set off of carried forward business loss of earlier years against the short-term capital gains of the Assessment Year under consideration, namely, 1991-92. Placing reliance on the provision of Section 72(1)(i), the assessee claimed that loss referred in the said Section was concerned with the loss in the business and not with the heads under Section 24 of the Act, and hence it was entitled to set off of carried forward investment allowance under Section 32-A(3) as against the short-term capital gains of the Assessment Year 1991-92, which was to the tune of Rs.61,51,910/-.

3. The assessee placed reliance on the decision of the Supreme Court reported in 32 ITR 688 (UNITED COMMERCIAL BANK LTD. Vs. CIT) as well as the decision reported in 57 ITR 306 (CIT Vs. COCANADA RADHASWAMI BANK LTD.) in support of its contention that the business income is broken up under different heads only for the purpose of computation of total income; as such, it was entitled for the benefit of set off of carried forward investment allowance. The said claim of the assessee was rejected by the Assessing Authority on the view that since Sub Clauses (i) and (ii) of Sub Section (1) of Section 72 are inclusive and not exhaustive, the assessee's claim was not acceptable. Aggrieved by this order, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals). By order dated 10.1.1995, the first appellate authority held that even if the assessee had no business income for the relevant year and had income only from capital gains, still the unabsorbed depreciation and unabsorbed investment allowance would have to be allowed as a set off against such income. Thus, the first appellate authority allowed the claim and directed the assessing authority to verify whether there was any unabsorbed depreciation or unabsorbed investment allowance relating to the earlier years for the purpose of granting set off against the income of the year under consideration, notwithstanding that there is no assessable income under the head "business" during the year under consideration.

4. The Revenue preferred an appeal to the Income Tax Appellate Tribunal in I.T.A.564/Mds/1995. By order dated 15.7.2003, the Income Tax Appellate Tribunal confirmed the view of the Commissioner of Income Tax (Appeals) that the entire investment allowance carried forward due to insufficient income could be allowed to the extent of the total income. In the circumstances, the Tribunal found that there was no infirmity in the order of the Commissioner of Income Tax (Appeals). Aggrieved

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

by this, the Revenue has preferred the present appeal.

5. Learned standing counsel appearing for the Revenue submitted that considering the scope of Section 72 that the loss for the purpose of adjustment has to be a loss in terms of commercial transaction, an allowance carried forward cannot be construed as a loss for the purpose of set off. He submitted that where the loss is on account of an unabsorbed depreciation or investment allowance, the same does not fall for consideration as a loss for adjustment under Section 72(2). In this connection, he placed reliance on the decision reported in [1985] 153 ITR 733 (C.I.T. Vs. VICTORIA MILLS LTD. (Bom.) to contend that the assessee is not entitled to a set off of the unabsorbed investment allowance as against the short term capital gains arising from the sale of cylinders.

6. Per contra, learned counsel for the assessee, supported the order of the Tribunal that the set off has to be considered in terms of the income computed on the profits and gains of the business and hence, prayed for rejection of the case of the Revenue.

7. Heard counsel for both sides.

8. Sections 70 to 80 of the Income Tax Act, 1961 contain provisions on set off of loss and carry forward and set off of business losses. While Sections 70, 71, 71-A deal on the set off of loss as against the head of income stated therein, where for any assessment year the net result of the computation of income under the head "profits and gains of business" is a loss and such loss cannot be set off under Section 71 on account of inadequacy or absence of income for the same year under any head, then the same may be carried forward under Section 72 for set off against the profits and gains of any business or profession in the following assessment year. We are concerned herein with the scope of Section 72.

9. Before dealing with the scope of Section 72, we may note the provisions of Section 72 of the Income Tax Act, 1961, as it stood during the assessment year 1991-92, which reads as follows:

> Carry forward and set off of business losses.
> --
> 72. -- (1) Where for any assessment year, the net result of the computation under the head "Profits and gains of business or profession" is a loss to the assessee, not being a loss sustained in a speculation business, and such loss cannot be or is not wholly set off against income under any head of income in accordance with the provisions of section 71, so much of the loss as has not been so set off or, where he has no income under any other head, the whole loss shall, subject to the other provisions of this Chapter, be carried forward

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

to the following assessment year, and --

(i) it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year:
Provided that the business or profession for which the loss was originally computed continued to be carried on by him in the previous year relevant for that assessment year; and

(ii) if the loss cannot be wholly so set off, the amount of loss not so set off shall be carried forward to the following assessment year and so on:
Provided that where the whole or any part of such loss is sustained in any such business as is referred to in section 33B which is discontinued in the circumstances specified in that section, and, thereafter, at any time before the expiry of the period of three years referred to in that section, such business is re-established, reconstructed or revived by the assessee, so much of the loss as is attributable to such business shall be carried forward to the assessment year relevant to the previous year in which the business is so re-established, reconstructed or revived, and --

(a) it shall be set off against the profits and gains, if any, of that business or any other business carried on by him and assessable for that assessment year; and

(b) if the loss cannot be wholly so set off, the amount of loss not so set off shall, in case the business so re-established, reconstructed or revived continues to be carried on by the assessee, be carried forward to the following assessment year and so on for seven assessment years immediately succeeding.

(2) Where any allowance or part thereof is, under sub-section (2) of section 32 or sub-section (4) of section 35, to be carried forward, effect shall first be given to the provisions of this section.

(3) No loss (other than the loss referred to in the proviso to sub-section (1) of this section) shall be carried forward under this section for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed. "

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

A reading of Section 72 shows that it is concerned about carry forward and set off of business losses against profits and gains of business. Dealing with the identical provisions under the 1922 Act, in the decision reported in 59 ITR 555 (SC) (C.I.T. Vs. JAIPURIA CHINA CLAY MINDS (P.) LTD.), the Supreme Court, had an occasion to consider the question of set off of unabsorbed depreciation of the past years under Section 24 of the Income Tax Act, 1922, which is equivalent to the present Section 72 of the Income Tax Act, 1961. The Apex Court held that proviso (b) to Section 24(2) gives preference to the business loss to be set off against the profits and gains of the business and the amount of loss not so set off shall be carried forward to the following year; that the fiction of adding the carried forward unabsorbed depreciation to the allowance or the depreciation of the following year and deeming it to be part of that allowance would not entitle the assessee to have a preference for set off over the business loss. The Supreme Court held that Section 24 gave a preference to reduction of losses first and only thereafter the depreciation carried forward. It held that "it is wrong to assume that Section 24(2) deals with the carrying forward of the depreciation. This carry forward having been provided in Section 10(2)(vi) and in a different manner; Section 24(2) only deals with losses other than the losses due to depreciation."

10. The aforesaid decision clearly pronounces on the scope of the provisions relating to the carry forward and set off of business loss and what are contemplated as loss for the purposes of set off. Now, a reading of Section 72 shows that no business loss can be carried forward for more than eight assessment years immediately succeeding the assessment year for which the loss was first computed (Section 72(3)). While providing for set off of a business loss under sub section (1) of Section 72, the set off provisions also provided for set off of carried forward unabsorbed depreciation, subject only to Section 72(1). As already seen vide the decision of the Supreme Court reported in 59 ITR 555 (SC) (C.I.T. Vs. JAIPURIA CHINA CLAY MINDS (P.) LTD.), Section 72(2) does not deal with the question of carry forward of depreciation or other statutory allowances and expenditure which are capable of being carried forward under various provisions of the Act.

11. The Act specifies some of the allowances which could be carried forward under the Act. They are:

(i) unabsorbed depreciation - [Section 32(2)]
(ii) unabsorbed investment allowance [Section 32A(3)(ii)]
(iii) unabsorbed development rebate [Section 33(2)(ii)]
(iv) unabsorbed development allowance [Section 33A(2)(ii)]
(v) unabsorbed capital expenditure on scientific research [Section 35(4)]
(vi) expenditure on prospecting for certain minerals [Section 35E (4)]
(vii) expenditure for promoting family planning [Section 36(1) (ix)]
(viii) losses in speculation business (Section 73) and losses in business other than speculation (Section 72)
(ix) losses under the head 'capital gains' (Section 74) and

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

(x) losses in the activity of owning and maintaining race horses [Section 74A(3)].

12. The order in which allowances under the provisions of the Act will be granted has also been a subject matter considered in a number of decisions of the Apex Court. The order in which the allowances and losses should be deducted are:
(i) current depreciation [Section 32(1)]
(ii) carried forward losses of earlier years [Section 72(1)]
(iii) unabsorbed depreciation of earlier years [Section 32(2)]
(iv) unabsorbed development rebate of earlier years [Section 32(2)(ii)]
(v) current development rebate [Section 33(2)(i)]
(vi) unabsorbed development allowance of earlier years [Section 33A(2)(ii)]
(vii) current development allowance [Section 33A(2)(i)]
(viii) unabsorbed investment allowance [Section 32A(3)(ii) and
(ix) currently investment allowance [Section 32A(3)(i)].

13. On the question of set off of the unabsorbed depreciation carried forward as against the business loss carried forward, in the decision reported in AIR 1991 SC 1322 (M/S.GARDEN SILK WEAVING FACTORY Vs. THE COMMISSIONER OF INCOME-TAX GUJARAT), the Supreme Court pointed out that unabsorbed depreciation is only a species of business loss. But for the special treatment accorded by Section 32(2) and Section 72(2) for the purpose of carry forward and set off of loss, there is no difference between an item of unabsorbed depreciation and an item of loss. Section 72 (2) contains an indication that where unabsorbed depreciation is a component of the figure of depreciation carried forward, the amount of loss proper should be set off first to be followed by the unabsorbed depreciation carried forward to be set off later. For purposes of carry forward of the allowance, the statute has drawn a distinction between them and outlined the procedure for claiming the same. Dealing with the aspect whether development rebate could be a business loss like a depreciation, the Supreme Court referred to the deductions for computation of profits of the business and held that the development rebate is an allowance and it cannot be a constituent element of the loss to be carried forward to later years and stands on a totally different footing from that of a depreciation allowance. Even with respect to the set off of the claim of carried forward depreciation allowance, referring to the provisions of Section 72, the Apex Court held that

in the matter of carry forward, business loss alone receive priority over carry forward depreciation allowance under Section 72(2), vide the decision reported in 59 ITR 555 (SC) (C.I.T. Vs. JAIPURIA CHINA CLAY MINDS (P.) LTD.).

14. Now, coming to other allowances which are permitted for carry forward, the purpose of the allowance under Section 32-A relating to investment allowance and development rebate under Section 33 are identical. As far as Section 32-A relating to the investment allowance is concerned, an assessee is granted a

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

deduction of investment allowance on the new assets installed or brought to use for the business in the previous year. The object of providing such deduction is to grant the assessee certain benefits by way of allowance in respect of investments made by him to earn income. The person who has invested to earn income is encouraged by allowances. It is a beneficial provision and encourages investment in machinery. The deduction is of a sum equal to 25% of the cost of the machinery, plant, ship or aircraft. Sub Section (3) explains the mode of deduction and provides for carry forward of unabsorbed allowance. It states, where the total income of the assessee after deducting the allowance under Section 33 and 33-A but without making any deduction under this Section is nil or less than the full amount of the investment allowance, under sub clause (i) of sub section (3), the sum to be allowed by way of investment allowance for that assessment year shall be only such amount as is sufficient to reduce the said total income to nil and to the extent that it had not been allowed, the investment allowance shall be carried forward to the following assessment year to be allowed, of such amount, as is sufficient to reduce the total income of the assessee for that assessment year to nil. The balance still outstanding shall be carried forward for a period of eight assessment years immediately succeeding the assessment year.

15. Dealing with the character of the allowance of development rebate under Section 33, in the decision reported in (1979) 117 ITR 132 (KAR) (MYSORE PAPER MILLS LTD Vs. CIT), the Karnataka High Court held that "Section 33 does not actually deal with any trading loss as it is ordinarily understood. Under Section 33, Parliament has made provision by way of an incentive to businessmen who invest on new machinery or in modernising plant and equipment. In order to earn development rebate, the assessee has to satisfy certain other conditions which are provided under Section 34 of the Act and the unabsorbed development rebate cannot be carried forward beyond eight years as provided by the Act. "

16. This Court had an occasion to consider the deductibility of development rebate and business loss carried forward from the earlier year. In the decision reported in (1981) 130 ITR 856 (MAD) (CIT Vs. COROMANDEL STEELS LTD.), after referring to the Karnataka High Court decision reported in (1979) 117 ITR 132 (KAR) (MYSORE PAPER MILLS LTD Vs. CIT), this Court held that the provision of development rebate is an incentive to businessmen who invest on new machinery in modernising plant and equipment. It does not deal with any trade in loss as is ordinarily understood. To earn development rebate, the assessee has to satisfy the conditions prescribed under Section 34. This Court further held that development rebate is not treated as a kind of other deductions contemplated by Sections 30 to 43; that as between unabsorbed development rebate and carried forward depreciation allowance, the latter will be given a priority in the matter of set off against the profits of the subsequent years. Although the said decision is concerned about priorities in adjustment of unabsorbed development rebate, unabsorbed depreciation and unabsorbed loss, yet the said decision is cited

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

only for the purpose of bringing to the fore that unlike depreciation, development rebate is not a loss. In fact, in the decision reported in 189 ITR 512 (M/S.GARDEN SILK WEAVING FACTORY, SURAT Vs. THE COMMISSIONER OF INCOME TAX, GUJARAT), the Supreme Court pointed out that depreciation allowance under Section 32 was a kind of loss and the development rebate under Section 33 was specifically stated as an allowance, which could not be a constituent element and a figure of loss to be carried forward to later years, that it stands on a totally different footing. The concept of investment allowance is no different either, the understanding, hence, is on the same footing as that of a development rebate under Section 33.

17. In the decision reported in [1986] 161 ITR 135 (Mad.), (EAST ASIATIC COMPANY (INDIA) P. LTD. Vs. COMMISSIONER OF INCOME TAX) (since upheld by the Apex Court in the decision reported in 216 ITR 607 (COMMISSIONER OF INCOME TAX Vs. VIRMANI INDUSTRIES PVT. LTD. AND OTHERS)), dealing with a case of depreciation for set off against the income from business under Section 41(2), income from other sources and capital gains, this Court had an occasion to deal with Section 72. Referring to Section 32(2), this Court held that Sections 70, 71 and 72, if read carefully, would show that all those three Sections deal only with business losses. This Court considered the question as regards the adjustment under Section 72 in a case where, other than capital gains, the assessee had no income, i.e., it had only a loss. The assessee contended therein that the unabsorbed depreciation is a loss; hence has to be set off against the income of the assessee under any other heads. This Court rejected the plea, taking the view that such an argument proceeds on a misapprehension that Section 71 includes allowances which are made permissible under Section 32.

18. In the said decision, this Court pointed out as follows:

> "25. ..... Clauses (i) and (ii) of sub-section (1) of section 72 provide as to how this carried forward loss has to be set off. We have, therefore, two provisions for carry forward. One is in respect of carry forward of loss and the other is in respect of carry forward of unabsorbed depreciation. The provision for carry forward of business loss is in section 72(1). The provision for carry forward of unabsorbed depreciation is in Section 32(2). When there is an express provision for carry forward of unabsorbed depreciation in Section 32(2), there cannot be again a provision for the same in section 72 (1). Even otherwise, the very placement of section 72 also indicates that what is intended to be carried forward under section 72 is business loss which it

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

> was not possible to set off under any head of income as provided in sub-section (2) of section 71. Sections 71 and 72, therefore, clearly refer to a business loss, the concept of which is entirely different from the concept of allowable deduction under Section 32(1) which is permitted to be carried forward under Section 32(2). This position is further made clear in section 72(2) .... "
>
> 26. The provision in section 72 (2) would clearly indicate that what is contemplated by Section 32(2) and what is contemplated by section 72(1) are entirely different concepts and when the question of set off of carried forward depreciation and carried forward losses arises, section 72(2) provides that effect has to be first given to section 72 before effect is given to the other two provisions mentioned therein. Though even on a construction of sections 71 and 72, it is difficult to accept the contention of the learned counsel for the assessee, the matter now stands concluded in so far as this court is concerned. In CIT v. Concord Industries Limited [1979] 119 ITR 458, this court was dealing with the scope of section 79 of the Income-tax Act, 1961, which is one of the provisions falling within the group of provisions dealing with set off and carry forward and set off. "

19. Learned standing counsel placed reliance on the decision reported in [1985] 153 ITR 733 (C.I.T. Vs. VICTORIA MILLS LTD. (Bom.), in support of his contention that carried forward investment allowance, as in the case of development rebate, is not a loss like depreciation for set off as against business loss. This decision relied on by the Revenue relates to a case of development rebate. The assessee therein sought for a set off of the unabsorbed development rebate against income from property and dividends. Referring to the decision of this Court reported in (1981) 130 ITR 856 (MAD) (CIT Vs. COROMANDEL STEELS LTD.), the Bombay High Court held that no provision other than the provisions of Section 33 governed the deduction and carry forward of development rebate. It held that the unabsorbed development rebate cannot be carried forward as a business loss under the provisions of Section 72. Section 72 is specifically on set off of carried forward business loss.

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

20. The sum and substance of these decisions referred to above is that development rebate is not treated as a loss for the purpose of Section 72. It is also seen that the concept of investment allowance is no different from a development rebate. Having regard to the scheme and purpose of granting deduction under these heads, the decisions rendered as regards development rebate have a relevance in the matter of understanding the set off available for carry forward investment allowance vis-a-vis Section 72.

21. In a recent decision reported in [2005] 272 ITR 165 (Mad.) (SESHASAYEE PAPER AND BOARDS LIMITED Vs. THE DEPUTY COMMISSIONER OF INCOME TAX), a Division Bench of this Court, to which one of us (K.Raviraja Pandian,J.) is a party, had an occasion to consider the scope of Section 72. While considering the question of set off of unabsorbed investment allowance carried forward even before the consideration of the unabsorbed depreciation, this Court pointed out the distinction between the claim under Section 32(2) and Section 33, and referring to the decision of the Gujarat High Court reported in 135 ITR 122 (MONOGRAM MILLS CO. LTD. Vs. COMMISSIONER OF INCOME-TAX, GUJARAT), held as follows:

> "10.5. Under Section 72, the unabsorbed depreciation shall be carried forward to a subsequent year and it shall be deemed to form part of that year's depreciation and shall be set off against the profits of that year subject to the provisions of sub-section (2) thereof. From the above provisions, it is clear that before setting off the carry forward unabsorbed depreciation of the earlier year, the depreciation of the current year shall have to be deducted and then after setting off of the loss, the unabsorbed depreciation, which is also treated as the current year's depreciation, shall be adjusted. Therefore, the carried forward unabsorbed depreciation of the earlier year has to be taken as a part of the current year's depreciation allowance and to be set off, to the extent possible, against income of the current year. There is no specific provision in the Act to specify the order of priority for allowing unabsorbed depreciation of the earlier years in the subsequent years, vis-a-vis carried forward unabsorbed development rebate. This is because development rebate is not a traditional loss or expenditure in the ordinary sense of the term. It is intended to give an incentive to business to investment in machinery or in modernisation of plant and equipment. It is available to an

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

assessee on fulfillment of certain conditions specified in the Act and in the event of non-availability of sufficient profit to enable allowance of the same in the year of acquisition, a provision has been made for carry forward of the same for a period of eight years. In the case of unabsorbed depreciation, there is no time limit. The scheme of the Act makes it clear that between unabsorbed development rebate and the unabsorbed depreciation, the latter will have priority in respect of set off against the profits of subsequent years, Vide decision of the Bombay High Court in COMMISSIONER OF INCOME TAX -VS- PREMIER AUTOMOBILES LTD., (1994) 206 ITR 1, wherein the decision of various High Courts in MYSORE PAPER MILLS LTD -VS- CIT (1979) 117 ITR 132 (KAR); CIT -VS- COROMANDEL STEELS LTD (1981) 130 ITR 856 (MAD); CALICUT MODERN SPG. AND WVG.MILLS LTD -VS- CIT (MANU/KE/0093/1985); BIHAR STATE INDUSTRIAL DEVELOPMENT CORPORATION LTD -VS- CIT (1987) 165 ITR 671 (PATNA) AND UTKAL MACHINERY LTD -VS- CIT (1987) 167 ITR 199 (ORISSA), were followed. "

22. The above-said decision clearly brings out the distinction in the matter of set off available in the case of allowances granted under the provisions of the Act. Except for the provisions contained under Section 72(2) as regards the unabsorbed depreciation, in the total absence of set off, similar provisions as regards other allowances like the development rebate or investment allowance does not escape our attention. While depreciation is considered as a loss, given the concept therein, investment allowance or development rebate do not have the same stamping, having regard to the object of granting such allowances. Hence, rightly, Courts have taken the view that by the very nature of their allowance, they do not carry the character of a loss to have a charge on the profits of the concern. The benefit is available for a set off of only those loss specified therein in the manner provided for under the Act. In the absence of any recognition given statutorily to treat the unabsorbed investment allowance as business loss or recognised for a set off as has been done in the case of unabsorbed depreciation allowance in the manner provided for under the Act, it is difficult to consider the same for any set off under Section 72.

23. Learned counsel appearing for the assessee relied on the decision reported in 291 ITR 258 (CIT Vs. CHENSING VENTURES (Mad.). We do not find any assistance from the said decision to the issue on hand.

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

24. A perusal of the decisions cited above clearly bring home the position of law as regards the claim of set off available under Section 72:

(i) that the provision of Section 72 is a part of the scheme contained in carry forward and set off of business loss;

(ii) that Sections 70, 71 and 72 deal only with business loss that Section 72 operates at a stage after Sections 70 and 71 are given effect to;

(iii) that in the working of relief under Section 72, the carried forward of business loss is first given the consideration;

(iv) that the concept of business loss for the purpose of Section 72(1) does not bring into its fold, the carried forward depreciation under Section 32(2) that the character of business loss is different from unabsorbed depreciation carried forward;

(v) that Section 72(2) provides that the benefit of the provisions of Section 32(2) has been made subject to Section 72(1);

(vi) that carried forward of business loss is given a priority before the clubbing of unabsorbed depreciation of the earlier years with the current year's depreciation and treating it as part of the current year's depreciation as per Section 32(2);

(vii) that in computing the current year's business income, the current year's depreciation is given first a deduction to be followed by set off by the carried forward business loss;

(viii) that the claim of set off of carried forward unabsorbed development rebate comes later in point of time to be followed by unabsorbed investment allowance to the investment allowance of the current year;

(ix) that carried forward unabsorbed depreciation and the carried forward investment allowance are treated differently even for the purpose of Section 72.

25. A look at the scheme of Section 32-A shows that the relief granted therein is an allowance given by way of an incentive to the business income to invest more on industry. A perusal of the provisions of Section 32-A shows that the relief granted is a once and for all relief. A perusal of Section 32-A shows that the relief is to the extent of 25% of the cost of the

https://hcservices.ecourts.gov.in/hcservices/

WEB COPY

ship, aircraft or machinery and the deduction is allowed subject to the fulfilment of the conditions. The allowance given under sub section (3) of Section 32-A shows that where the total income of the assessee is nil or less than the full amount of the investment allowance, the sum to be allowed by way of investment allowance shall be only such amount as is sufficient to reduce the said total income to nil and that to the extent to which it has not been allowed, the same shall be carried forward to be allowed for the subsequent assessment year to reduce the total income for that assessment year computed in the manner stated in the provisions to nil and the balance of investment allowance shall be carried forward to the following assessment year and so on, that no portion of the investment allowance shall be carried forward for more than eight assessment years. It must be noted that the investment allowance, as in the case of development rebate, is granted as and by way of incentive as noted in the decision reported in (1981) 130 ITR 856 (MAD) (CIT Vs. COROMANDEL STEELS LTD.). The Supreme Court, in the decision reported in 105 ITR 642 (P.K.BADIANI Vs. C.I.T. (SC)), held that even though the relief under Section 33 as regards the development rebate was granted, the deduction continues to retain its original character of profits. Unlike a depreciation, the deduction under Section 32-A is granted subject to the assessee creating a reserve. Given the object of the allowance under Section 32-A and going by the scheme of set off of business loss as given under Sections 70 to 80, the set off available under Section 72 is circumscribed by the provisions given therein. Unless carried forward investment allowance has a character of a business loss, it is not possible for an assessee to have the same set off against short-term capital gains. The provisions relating to set off is a statutory facility. Hence, the loss that has to get in under the head of business loss must be computed keeping in mind what is contemplated as loss for the purposes of set off under Section 72. It may be noted that Sections 72, 73, 74 and 74-A clearly provided for kinds of loss that can be carried forward under the Act to be set off against income on profits. No other loss as such, can be carried forward to have the set off under the aforesaid provisions. The decision of the Supreme Court reported in 59 ITR 555 (SC) (C.I.T. Vs. JAIPURIA CHINA CLAY MINDS (P.) LTD.) pointed out that Section 72 deals with carry forward of business loss. They do not deal with the question of carry forward of depreciation and other statutory allowances which are allowed to be carried forward. Even in the presence of a deeming provision under Section 32(2) as regards the carried forward depreciation, sub section (2) of Section 72 states that effect should be given first to the provisions of sub section (1) of Section 72 namely, the business loss and only thereafter to the carried forward depreciation. This makes the position of law very clear that other than this, carry forward of investment allowance does not adorn the character of a business loss for the purposes of Section 72 to have the adjustment of capital gains.

https://hcservices.ecourts.gov.in/hcservices/

In the circumstances, we do not agree with the reasoning of the Tribunal. Hence, we set aside the order of the Tribunal and hold that the carried forward investment allowance cannot be

WEB COPY

treated as a business loss for the purpose of Section 72 to have the benefit of set off of capital gains. In the view thus expressed, we allow the Tax Case Appeal filed by the Revenue. The question raised hence, is answered in favour of the Revenue. There will, however, be no order as to costs.

ksv

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1.The Assistant Registrar,
Income Tax Appellate Tribunal
"C" Bench, Rajaji Bhavan,
III Floor, Besant Nagar, Madras.90.

2.The Commissioner of Income-
Tax (Appeals),
Coimbatore.

3.The Deputy Commissioner Of Income-tax,
Special Range I,
Coimbatore

+ 1 cc to Mr. N. Muralikumaran, Advocate SR No. 58239

judgment in

T.C. (Appeal) No.50 of 2004

MDR(CO)
SR/22.10.2007

https://hcservices.ecourts.gov.in/hcservices/